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CHANG SHU HUA

v.

GOON FOOK HONG

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COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ZULKEFLI MAKINUDIN JCA
ZAINUN ALI JCA
[CIVIL APPEAL NO: W-02-1263-2004]

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14 FEBRUARY 2008

FAMILY LAW: *Divorce - Maintenance - Refusal to grant order for maintenance - Whether High Court erred in resolving claim upon conflicting affidavit evidence - Power of court to compel parties to examine*

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deponents of affidavit - Whether to be resorted to - Rules of High Court 1980, O. 38 r. 2(3)

CIVIL PROCEDURE: *Trial - Divorce petition - Claim for maintenance - Judge resolving disputes upon conflicting affidavit evidence - Non-recourse to viva voce evidence - Whether improper - Whether judge*

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to implore parties to examine deponents of affidavits - Rules of High Court 1980, O. 38 r. 2(3)

This was an appeal by the wife/plaintiff against the decision of the learned High Court judge who, while allowing partly the plaintiff's

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claim for matrimonial assets and custody following the couple's divorce, dismissed altogether her claim for maintenance. It was apparent that the learned judge, in deciding the way he did, was of the view that the plaintiff was a person of wealthy means, and that she had failed as a mother and was responsible for the

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breakdown of the marriage. Before the learned justices of appeal herein, the plaintiff *inter alia* argued that the learned judge had erred by relying heavily on the statements of the children so referred to by the defendant in his affidavits, they being unsworn and hearsay evidence. It was further argued that the learned judge

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erred in law and in fact in finding that the documentary evidence as exhibited by the defendant's affidavits were not controverted or showed that the plaintiff was a wealthy person.

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Held (allowing appeal, ordering *viva voce* trial on maintenance and granting interim order for maintenance)
Per Zulkefli Makinudin JCA delivering the judgment of the court:

(1) The learned judge had erred when he attempted to resolve the conflicts in the affidavit evidence of both parties by unduly favouring the defendant's case. And arising therefrom, the learned judge had also made a number of contradictory findings in his judgments, such as holding that the marriage would not have broken down if not for the defendant's adultery, but later on made a finding that the plaintiff was the cause of the breakdown. Likewise, the judge, in holding that the plaintiff had sold the goods and converted the cash for her own use, had only considered the affidavit evidence of the defendant and ignored the plaintiff's affidavit evidence that the cash had been utilized to finance the purchase of the matrimonial home and other movable and immovable property. (paras 6-8)

(2) In view of the many disputed facts raised in the affidavits filed by the plaintiff and the defendant where such allegations made were credibly denied by the respective parties, the learned judge should have ignored these disputed facts instead of unduly resolving them in favour of the defendant. In short, the learned judge ought to decide the case before him by consideration of the undisputed facts. (para 11)

(3) In this case, neither the plaintiff nor the defendant had called oral evidence or applied to cross-examine the deponents of the respective affidavits. However, O. 38 r. 2(3) Rules of the High Court 1980 empowers the court in such a case to allow the parties to examine such deponents. That being so, and in the contexts of the present case, the learned judge ought to have at least indicated to the parties that unless he or she calls for oral evidence or applies to cross-examine the deponents of the opposing affidavits, then he or she may not succeed in proving his or her case. This the learned judge failed to do. (paras 11 & 12)

(4) In the circumstances, this court would set aside the order of High Court, remit the case for trial by *viva voce* on the issue of maintenance and issue an interim maintenance order of a sum of RM6,000 per month to be paid to the plaintiff pending determination of the matter in originating summons dated 8 July 2004 herein. (para 13)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan isteri/plaintif terhadap keputusan yang arif hakim Mahkamah Tinggi yang, sementara membenarkan sebahagian tuntutan plaintif terhadap ase-aset perkahwinan dan penjagaan, telah menolak keseluruhan tuntutan plaintif untuk nafkah. Adalah agak jelas bahawa yang arif hakim, dalam mencapai keputusan yang sedemikian rupa, berpandangan bahawa plaintif adalah seorang yang kaya, dan bahawa beliau gagal menjadi ibu yang baik serta bertanggungjawab terhadap keruntuhan rumahtangganya. Di hadapan yang arif hakim-hakim rayuan di sini, plaintif antara lain berhujah bahawa yang arif hakim khilaf kerana terlalu bergantung kepada kenyataan yang dibuat oleh anak-anaknya seperti yang terserlah dari afidavit-afidavit yang difailkan oleh defendan, memandangkan bahawa kenyataan-kenyataan tersebut adalah keterangan tidak bersumpah dan dengar cakap. Juga dihujahkan bahawa yang arif hakim khilaf di sisi undang-undang dan fakta apabila mendapati bahawa keterangan dokumentari seperti yang dikemukakan melalui afidavit defendan adalah tidak disangkal atau menunjukkan bahawa plaintif adalah seorang yang kaya raya.

Diputuskan (membenarkan rayuan, memerintahkan perbicaraan *viva voce* mengenai nafkah dan membenarkan perintah interim nafkah)
Oleh Zulkefli Makinudin HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim khilaf bilamana beliau cuba menyelesaikan konflik pada keterangan afidavit kedua-dua pihak dengan memihak dengan cara yang tidak patut kepada defendan. Dan berbangkit dari situ, yang arif hakim juga telah membuat dapatan-dapatan yang bertentangan antara satu sama lain, seperti memutuskan bahawa perkahwinan tidak akan runtuh jika tidak kerana perlakuan zina oleh defendan, tetapi

kemudiannya merumuskan bahawa plaintif adalah punca kepada keruntuhan rumahtangga. Begitu juga, dalam mendapati bahawa plaintif telah menjual barang-barang dan menggunakan wang untuk manfaat dirinya sendiri, hakim hanya menimbang keterangan afidavit defendan dan langsung tidak mengendahkan keterangan afidavit plaintif bahawa wang telah digunakan bagi membiayai rumah kelamin serta membeli barang-barang alih dan tak alih lain.

(2) Mengambilkira banyaknya fakta-fakta yang dipertikai yang dibangkitkan di dalam afidavit-afidavit yang difailkan oleh plaintif dan juga defendan di mana alegasi-alegasi tersebut telah disangkal dengan yakinnya oleh kedua-dua belah pihak, maka yang arif hakim seharusnya tidak mengendahkan fakta-fakta dipertikai tersebut dan tidak juga cuba menyelesaikannya secara yang berpihak kepada defendan. Dalam ertikata lain, yang arif hakim sepatutnya memutuskan kes di hadapannya atas pertimbangan fakta-fakta yang tidak dipertikai sahaja.

(3) Dalam kes ini, sama ada plaintif mahupun defendan tidak memanggil keterangan oral atau memohon untuk menyoal balas deponen-deponen yang membuat afidavit-afidavit yang berkaitan. Bagaimanapun, A. 38 k. 2(3) Kaedah-kaedah Mahkamah 1980 memberi kuasa kepada mahkamah dalam kes sebegini untuk membenarkan pihak-pihak memeriksa balas deponen-deponen berkenaan. Oleh yang demikian, dan dalam konteks kes semasa, yang arif hakim setidak-tidaknya harus memberitahu pihak-pihak bahawa kecuali mereka memanggil keterangan oral atau memohon untuk menyoal balas deponen-deponen afidavit yang bertentangan, maka mereka mungkin didapati gagal membuktikan kes mereka. Ini tidak dilakukan oleh yang arif hakim.

(4) Dalam halkeadaan yang wujud, mahkamah ini mengenepikan perintah Mahkamah Tinggi, menghantar balik kes untuk perbicaraan *viva voce* mengenai isu nafkah dan membenarkan perintah interim nafkah untuk jumlah RM6,000 sebulan yang harus dibayar kepada plaintif sementara menunggu keputusan saman pemula bertarikh 8 Julai di sini.

[Perintah sekadarnya.]

Case(s) referred to:
Tay Bok Choon v. Tahansan Sdn Bhd [1987] 1 CLJ 441; [1987] CLJ (Rep) 24 PC ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 38 r. 2(3)

For the appellant - Lum Chee Seng; M/s Lum Chee Seng & Assoc
For the respondent - Fong Teng Fook; M/s Yusuf Khan & Fong

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S8-24-1382-2004]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Zulkefli Makinudin JCA:

Introduction

[1] This is an appeal by the plaintiff against the decision of the High Court at Kuala Lumpur which allowed only a part of the plaintiff's claim for maintenance, matrimonial assets and custody. The learned judge of the High Court only allowed joint custody of the children to both the plaintiff ("the wife") and the defendant ("the husband") with actual care and control to the defendant, and that the matrimonial home would be held by both the plaintiff and the defendant on trust for their children. The plaintiff's other claims including maintenance were dismissed. At the outset of the hearing before us learned counsel for the plaintiff indicated that due to change of circumstances in the last few years pending hearing of the appeal, the plaintiff wished to abandon the other claims in the appeal and is now proceeding only with her claim for maintenance.

Background Facts Of The Case

[2] The relevant background facts of the case are as follows:

[3] The plaintiff and the defendant were married on 22 February 1983 and they have three children, two daughters and a son, aged between thirteen and eighteen years old. The plaintiff was from Taiwan and is now a permanent resident of Malaysia. The

plaintiff alleged that during the marriage, she and her husband, the defendant had entered into a direct sale business with a company known as E. Excel International Incorporated.

As a result of their effort, the direct sale business was very successful. Thereafter, the said business was transferred to Wiranet Sdn. Bhd. in which the defendant holds 1999 shares and the plaintiff holds one share. The family depends on the commission received from the said Wiranet company for daily living, investment and others. The plaintiff alleged that in December 2002, she found out that the defendant had committed adultery. The defendant exerted pressure on her that either she accept his adulterous relationship or be separated from him and be expelled from the matrimonial home. The plaintiff then rushed back to her parents' home in Taiwan. However, when she came back to Malaysia she found out that the matrimonial home was locked, her personal belongings and multi-purpose vehicle, Nissan Serena had disappeared. The defendant also hid the children from her. Thereafter, the plaintiff filed claim against the defendant to restore the matrimonial home with full furnishing, maintenance and custody of her children (refer to statement of claim at pp. 45-55 of the appeal record). The defendant however, alleged that before the plaintiff deserted the family, she had taken away RM5 million from the company's account and left him heavily in debt. Furthermore, the plaintiff has maintained several accounts with nine financial institutions locally as well as in institutions in China and Taiwan. The defendant also alleged that the children were scared of her and she had taught them since they were young to steal from hotels and supermarkets. Therefore, the plaintiff's claim as contended by the defendant is false and is intended to gain sympathy from the court.

Findings Of The High Court

[4] The learned judge of the High Court in his judgment allowing only a part of the plaintiff's claim *inter alia* held that the plaintiff is a person of wealthy means who possessed over fifty two (52) bank accounts in over nine financial institutions locally, and unaccounted accounts overseas in China and Taiwan. The learned judge found that the plaintiff failed as a mother to provide love and affection to her children. All the three children recalled that

A the plaintiff taught them to steal from hotel and supermarket. The learned judge further held that the plaintiff had lied to the court that she was ignorant of any third party involvement.

The marriage had broken down more than ten years ago.
B According to the children's account of the past the plaintiff was the cause of the breakdown of the marriage.

Decision Of The Court On Appeal

[5] In the appeal before us learned counsel for the plaintiff
C submitted that the learned judge of the High Court had erred when he relied heavily on the statements of the children referred to by the defendant in his affidavits which were not only unsworn but also were hearsay evidence. Learned counsel for the plaintiff further argued that the learned judge had erred in law and in fact
D when he held that the contemporary documentary evidence exhibited in the defendant's affidavit were not controverted and showed that the plaintiff is a wealthy person.

[6] Having studied carefully the records of appeal and the
E proceedings before the learned judge of the High Court, we are of the considered view that the learned judge had erred when in arriving at his decision, he had attempted to resolve the conflicts in the affidavit evidence of both parties by unduly favouring the defendant's case. Arising from his attempt to resolve the conflicts
F in the said affidavit evidence the learned judge had also made a number of contradictory findings in his judgment. We found as a fact there are conflicts in the affidavit evidence filed by both the parties and contradictory findings of the learned judge, some of which can be highlighted as follows:

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[7] We noted the learned judge held that the marriage of the plaintiff and the defendant would not have broken down if it were not for the defendant committing adultery with Law Sok Noy and maintaining such adulterous relationship with her. The learned
H judge went on to hold that the defendant and Law Soy Noy must bear the full responsibility for the breakdown of the marriage between the defendant and the plaintiff. However, the learned judge later in his judgment held that the plaintiff was the cause of the breakdown of the marriage which is contradictory to what he
I had held earlier. On this point we observed that the decision of the learned judge was, obviously, based and influenced by the

statements made by the children against the plaintiff as contained in the affidavit of the defendant which were not only unsworn but also hearsay evidence. A

[8] We also noted that the learned judge took into consideration only the affidavit evidence of the defendant and held that the plaintiff sold the goods and converted the cash for her own use. The learned judge had failed to take into consideration the affidavit evidence of the plaintiff that the cash had been utilized to finance the purchase of the said matrimonial property, and other immovable and moveable property for the defendant and for the payment of other expenses. (See pp. 177-181 of the appeal record). B C

[9] We are also of the view that the learned judge erred in law and fact in holding that the contemporary documentary evidence exhibited in the defendant's affidavits were not controverted and showed that the plaintiff is a wealthy person. We find the allegations that the plaintiff had taken all the money of the defendant's company in the sum of approximately RM5 million kept in banks had been denied and explained by the plaintiff in her affidavits. (See pp. 166-171 of the appeal record). D E

[10] We further observed that the learned judge erred in holding that the plaintiff operated overseas bank account in both China and Taiwan. The evidence given by the defendant did not show that the plaintiff operated bank account in China. The bank account in Taiwan had been explained by the plaintiff, that is, the money was sent for use by the plaintiff's parents in Taiwan. (See p. 181 of the appeal record). F

[11] It is our judgment that in view of the many disputed facts raised in the affidavits filed by the plaintiff and the defendant where such allegations made were credibly denied by the respective parties, the learned judge of the High Court should have ignored these disputed facts instead of unduly resolving them in favour of the defendant. The learned judge must decide the case before him by consideration of the undisputed facts. It is noted that in the proceedings before the High Court neither the plaintiff nor the defendant called oral evidence or applied to cross-examine the deponents of the respective affidavits so as to prove a disputed fact. On this point O. 38 r. 2(3) of the Rules of the G H I

A High Court 1980 empowers the court to allow the parties to examine the deponents of the opposing affidavit which reads in these terms:

> (3) In any cause or matter began by Originating Summons, Originating Motion or Petition, and, on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination on the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

[12] It is true in civil proceedings the trial judge has no power to dictate a litigant what evidence he should tender. The court cannot give direction about evidence unless one of the litigants desires such direction to be made. (See the case of *Tay Bok Choon v. Tahansan Sdn. Bhd.* [1987] 1 CLJ 441; [1987] CLJ (Rep) 24). However, in the context of the present case we are of the view the learned judge of the High Court should have at least indicate to the particular party concerned that unless he or she calls oral evidence or applies to cross-examine the deponents of the opposing affidavits to prove either a disputed fact or for the purposes of disproving an allegation made, then he or she may not succeed in proving his or her case. At the end of the day it is the trial judge who must decide the case on the evidence before him. In the present case we find that the learned judge of the High Court had failed to do so.

Conclusion

[13] For the reasons above stated, we are of the view this is a fit and proper case for us to set aside the order of the High Court dated 27 October 2004 and make an order that by consent the case be remitted to the High Court for trial by *viva-voce* on the issue of maintenance of the plaintiff (wife). We also make an interim order of a sum of RM6,000 per month to be paid by the defendant to the plaintiff as maintenance from the month of November 2006 until the matter in the originating summons dated 8 July 2004 relating to the maintenance of the wife is decided and determined by the High Court at Kuala Lumpur. The defendant

is to pay the plaintiff the arrears of maintenance of RM6,000 per month from 8 July 2004 until the month of October 2006 on or before 1 Mac 2007. The cost of the proceeding in this appeal is to follow the event of the retrial and the deposit is to be refunded to the plaintiff.

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